Editor's note: 80 I.D. 571; Appealed -- aff'd, Civ. No. LV-74-9 (D. Nev. June 6, 1975); reversed and remanded to Secy., No. 75-2928 (9th Cir. Mar. 29, 1977); vacated on judicial remand by order dated April 29, 1985 -- See 12 IBLA 409A th D below.

UNITED STATES

v.

J. L. BLOCK

IBLA 72-428 Decided August 28, 1973

Appeal from decision of Administrative Law Judge 1/ Dean F. Ratzman (Nevada Contest No. N-066428) declaring mining claim null and void.

Affirmed.

Mining Claims: Contests -- Mining Claims: Discovery: Marketability -- Rules of Practice: Evidence -- Rules of Practice: Government Contests -- Rules of Practice: Hearings

Where a prima facie case rests upon the establishment of a negative fact, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests upon him to produce such

1/ The title of the hearing officer has been changed from "Hearing Examiner" to "Administrative Law Judge." 38 F.R. 10939.

evidence of sufficient weight and credibility, and failing, the negative will be presumed to have been established. This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of nonmarketability, and the contestee only testifies that he made sales but fails to buttress that testimony with specific data as to the sales or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof.

Mining Claims: Discovery: Generally

Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would not be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, a discovery does not exist within the meaning of the mining laws.

12 IBLA 394

Mining Claims: Discovery: Marketability -- Mining Claims: Common Varieties of Minerals: Generally

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. Where a claimant fails to make such a showing, the claim is properly declared null and void.

Mining Claims: Determination of Validity

Where a mineral claimant has located a group of claims, he must show a discovery on each claim located to satisfy the requirements of the mining laws.

Mining Claims: Common Varieties of Minerals: Generally

To determine whether a deposit of sand and gravel is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type materials to ascertain whether the deposit has a property giving it distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use, and that such value is reflected generally by the fact that the material commands a higher price in the marketplace.

APPEARANCES: E. A. Hollingsworth, Esq., Reno, Nevada, for appellant;
Otto Aho, Esq., Field Solicitor, Department of the Interior, Reno, Nevada, for appellee.

OPINION BY MR. FISHMAN

J. L. Block has appealed from a decision of Administrative Law

Judge Dean F. Ratzman, dated April 28, 1972, declaring appellant's Community No. 3 placer mining claim null and void.

The Judge declared the mining claim null and void on the basis that there was no substantial evidence in the record to establish that the sand and gravel deposit on the claim was marketable at a profit prior to July 23, 1955.

The Community No. 3 placer mining claim was located for sand and gravel on November 20, 1946. The land embraced within the limits of the claim is described as the NE 1/4 sec. 2, T. 21 S., R. 62 E., M.D.M., Clark County, Nevada. The claim is approximately 7 1/2 miles east of the center of Las Vegas on the western foot of the south end of Frenchman Mountain.

The Community No. 3 is one of eight contiguous placer claims which were located by one of appellant's predecessors in interest. The claims are referred to as the Community Nos. 1 to 8. The Community No. 2 claim was determined to be on privately-owned land. The Community No. 6 was patented in 1967. The Community Nos. 1, 4, 5, 7, and 8 were declared null and void. United States v. Stewart, Contests Nos. N-062079 through 062084 (February 22, 1972).

The complaint, issued by the Bureau of Land Management on

March 1, 1967, charged that minerals had not been found within the limits of the claim in sufficient quantity or quality to constitute a discovery, and that no discovery of a valuable mineral deposit had been made within the limits of the claim because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955, or at the time of the contest. After several delays, a hearing was held on February 17, 1971.

Appellant argues that the findings of the Judge are not supported by any probative evidence, and that the Judge failed to give proper weight to appellant's evidence. The only witness at the hearing was a mineral examiner, Thomas E. Schessler, who testified on behalf of contestant. Schessler examined the claims on two occasions in 1971. He testified that there was a large scraped area in the southwest corner of the claim from which he estimated over 35,000 yards of sand and gravel had been removed. On the basis of an aerial photograph taken on October 27, 1955, Schessler testified that the only work shown on the Community No. 3 claim at that time, aside from rills, was a small dip in the southwest corner extending over the boundary line of another claim immediately to the west. On the basis of two other aerial photographs taken on February 27, 1961, and October 4, 1964, Schessler concluded that no work had been done on the claim between 1955 and 1961, and that the 35,000 yards of sand and gravel had been removed between 1961 and

1964. He further testified that since October of 1964, nothing appeared to have been removed from the claim.

While Schessler was unable to determine the quantity of sand and gravel removed from the claim prior to 1955, contestee, in his deposition submitted after the hearing, asserted that there were "3,000 to probably 7,000 cubic yards sold." Contestee also asserted that substantial amounts of sand and gravel had been removed from the claim since October of 1964.

Schessler testified that the sand and gravel found on the claim could be used for any purpose for which common varieties of sand and gravel are normally used. He stated that the normal uses for deposits of sand and gravel in the Las Vegas area were road construction, base and fill material, and concrete aggregate, and that the deposits were primarily fill-type material, except for that which is processed for concrete. He concluded that the sand and gravel on the Community No. 3 was a common variety.

In connection with the marketability of the material on the Community No. 3, Schessler was of the opinion that whatever market may have existed, was lost. He based his opinion on the small amount of material removed from the claim as evidenced by the 1955 aerial photograph. He also concluded that there was no apparent

market for the material on the claim for a period of at least six years after October 27, 1955, since his examination and the aerial photographs showed no evidence of mining operations on the claim during that time. He testified on cross-examination that the market for sand and gravel in the Las Vegas Valley had almost doubled between 1955 and 1971, but that the growth in the market still had not generated production from the Community No. 3.

Based upon the evidence presented, the Judge found that the sand and gravel on the claim was a common variety, and had not been demonstrated to have been marketable at a profit prior to July 23, 1955. The Judge's findings are supported by substantial and probative evidence. Moreover, our de novo consideration of the record impels us to reach the same findings.

Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, a discovery exists within the meaning of the mining laws. Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968). Common varieties of sand and gravel were withdrawn from location under the mining laws on July 23, 1955. 30 U.S.C. § 611 (1970). Consequently, to satisfy the requirements for discovery on a

placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Humboldt Placer Mining Co., 8 IBLA 407 (1972).

In applying these tests to the facts of the case at bar, we conclude that appellant failed to demonstrate a discovery within the limits of the Community No. 3 claim. While the evidence shows that some material was removed from the claim prior to 1955, the only evidence of sales was the testimony of appellant in his deposition. Appellant stated that there were "3,000 to probably 7,000 cubic yards sold," but offered no documentary or other evidence to substantiate his testimony; nor did appellant submit any evidence showing his cost or the price at which he assertedly sold the sand and gravel.

The following evidentiary rule has received judicial approbation in Allstate Finance Corp. v. Zimmerman, 330 F.2d 740, 744 (5th Cir. 1964):

> Where the burden of proof of a negative fact normally rests on one party, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests on the latter to produce such evidence, and failing, the negative will be presumed to have been established. [Citations omitted.]

In the case at bar, the Government does not have the risk of non-persuasion, but only the obligation to make a prima facie case. A fortiori, the rule is even more binding here.

In Fleming v. Harrison, 162 F.2d 789, 792 (8th Cir. 1947), the court addressed itself to the requirement that a party, having evidence peculiarly within his knowledge or control, should adduce it, stating:

> The applicable rule is stated in Selma, Rome and Dalton Railroad Co. v. United States, 139 U.S. 560, 567, 568, 11 S.Ct. 638, 640, 35 L.Ed. 266, as follows: "* * * While the general rule is that the burden of proof is where the pleadings place it, namely, upon the party against whom judgment must go, if no evidence whatever is introduced, its application is often affected by circumstances. `From the very nature of the question in dispute,' says Mr. Best, `all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies

> on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.' 1 Best, Ev. § 274; 1 Greenl. Ev. § 79; 2 Starkie Ev. 589." See, also, United States v. Denver & Rio Grande Railroad Co., 191 U.S. 84, 92, 24 S.Ct. 33, 48 L.Ed. 106; Mammoth Oil Co. v. United States, 275 U.S. 13, 51, 53, 48 S.Ct. 1, 72 L.Ed. 137; Board of Commerce v. Security Trust Co., 6 Cir., 225 F. 454, 459, 20 Am. Jur., Evidence, § 139, page 145; 31 C.J.S., Evidence, § 113, p. 721.

This principle applies in a mining claim contest to the extent that where the Government has made a prima facie case of non-marketability, and the contestee only testifies that he made sales, but fails to buttress the testimony with specific data, or provide corroborating evidence thereof, he will be deemed to have failed in his burden of proof.

Appellant argues that the Judge erred in finding that the claim was too far from a paved road for the sand and gravel to be sold competitively; however, the mineral examiner's testimony is a sufficient predicate for the Judge's finding. Moreover, appellant offered no evidence to demonstrate that the sand and gravel from the Community No. 3 could have been sold competitively.

Appellant takes issue with the position of the Department in requiring a mining claimant to demonstrate a discovery on each

claim, and asserts that there is no authority outside the Department for such a position. Appellant's theory of the case appears to be that the Community No. 3 must be considered as an integral part of one "mining claim" embracing the group of Community claims, and that only one discovery need be demonstrated on the group of claims to establish the validity of each location.

Appellant's position is untenable. The Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 23 (1970), provides in part that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The Act of March 3, 1891, 26 Stat. 1097, 30 U.S.C. § 35 (1970), provides in part that "[c]laims usually called `placer' * * * shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims * * *."

Where, as here, a mineral claimant or his predecessor in interest has located a group of claims, he must show a discovery on each claim located to satisfy the requirements of the mining laws. United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972). It is not enough to offer evidence for the claims as a unit. United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331 (1969).

While we recognize the difference between the terms "location" and "mining claim", and that the terms are used interchangeably the mining laws clearly require that a discovery is essential for each location. 30 U.S.C. § 23 (1970) and 30 U.S.C. § 35 (1970); United States v. Bunkowski, supra; Steele v. Tanana Mines R. Co., 148 F. 678 (9th Cir. 1906); Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co., 141 F. 563 (8th Cir. 1905); Lindley on Mines, 3d Ed., §§ 437, 438. The discovery of mineral on one claim will not support rights to another claim or group of claims even though the claims are contiguous. Ranchers Exploration & Development Co. v. Anaconda Co., 248 F. Supp. 708 (D.C. Utah 1965).

Appellant argues that the Judge erred in concluding that the deposit of sand and gravel on the claim was a common variety. In support of his argument appellant asserts that the pleadings do not raise the issue of whether the material on the claim is of a common or uncommon variety.

The complaint charged in part that:

> No discovery of a valuable mineral has been made within the limits of the claim because the mineral materials present cannot be marketed at a profit and/or could not be marketed at a profit prior to the Act of July 23, 1955. (Emphasis added.)

The Act of July 23, 1955, 69 Stat. 368, as amended, 30 U.S.C. § 611 (1970), provides in part:

> No deposit of common varieties of sand * * * gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws. * * * "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

Appellant denied the allegation in his answer but made no counter-charge that the materials within the limits of the claim were of an uncommon variety or that the materials were valuable because the deposit had some property giving it distinct and special value.

In our view, the pleadings raised the issue of whether the material on the claim was of a common or uncommon variety. Contestant made its allegation and referred to the Act of Congress which removed common varieties of sand and gravel from location under the mining laws. The language in the complaint charging that the materials present within the limits of the claim could not be marketed at a profit prior to the Act of July 23, 1955, only has meaning if the materials referred to are considered as common varieties.

Appellant next argues that the patenting of the Community No. 6, which has embraced within its limits deposits of sand and gravel comparable to those of the Community No. 3, conclusively demonstrates that the sand and gravel on the Community No. 3 is of an uncommon variety.

The record supports the assertions made by appellant that the Community No. 6 was patented, and that the sand and gravel on the two claims is comparable. It does not follow, however, that the sand and gravel on either claim is of an uncommon variety. Since the Community No. 6 was located before the Act of July 23, 1955, i.e., before common varieties of sand and gravel were removed from the coverage of the mining laws, it was not necessary, as a pre-requisite for patent, to establish that the sand and gravel on the Community No. 6 was of an uncommon variety.

As stated in United States v. U. S. Minerals Development Corporation, 75 I.D. 127 (1968), the Department interprets the 1955 Act as requiring uncommon varieties of sand and gravel to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. In order to determine whether a deposit of sand and gravel has a unique property which gives it a distinct and special value, there must be a comparison of the material under consideration with

other deposits of similar materials. Therefore, it must be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or if the material is to be used for the same purposes as other materials of common occurrence, that it possess some property which gives it a special value for such uses, which value is generally reflected by the fact that it commands a higher price in the market place. United States v. California Soylaid Products, Inc., 5 IBLA 179 (1972). See United States v. Thomas, 1 IBLA 209, 78 I.D. 5 (1971).

The Judge found that the material on the Community No. 3 could be used for the normal and general uses for which sand and gravel are utilized in the Las Vegas area, and that the material had no unique property. He concluded that the material was a common variety under the Act of July 23, 1955. The findings and conclusions of the Judge are supported by the testimony of the mineral examiner who testified on behalf of contestee. While appellant takes issue with these findings and conclusions, appellant presented no convincing evidence in rebuttal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman, Member

We concur:

Martin Ritvo, Member

Joan B. Thompson, Member

APR 29 1985

IBLA 72-428 : Nevada Contest No. 66428	:
UNITED STATES	: Mining Claim Contest
	: (Community No. 3
v.	: Placer Claim)
	:
J. L. BLOCK (ON JUDICIAL REMAND)	: Decision Vacated;
: Case Remanded	
	:
IBLA 80-297 : N MC 127437	
:	:
NEVADA PACIFIC COMPANY INC.	: Mining Claim Recordation (ON JUDICIAL
REMAND) : Community No. 3	
	: Placer Claim)
:	
	: Decision Vacated;
	: Case remanded

ORDER

On April 28, 1972, Administrative Law Judge Dean F. Ratzman issued a decision declaring the Community No. 3 placer mining claim, held by J. L. Block and, later, by Nevada Pacific Company, Inc., 1/ null and void because there was no substantial evidence in the record to establish that the sand and gravel deposit on the claim was marketable at a profit prior to July 23, 1955. Block appealed Judge Ratzman's decision to this Board, which docketed the appeal as IBLA 72-428 and subsequently affirmed it by decision dated August 28, 1973, United States v. Block, 12 IBLA 393 (1973).

By Memorandum dated March 29,, 1977,, the United States Court of Appeals for the Ninth Circuit vacated the Board's decision and remanded the case to the Department for further proceedings, J. L. Block v. Andrus, No. 75-2928 (9th Cir. March 29, 1977). The matter was returned to this Board for further action in September 1979. On December 8, 1980, the Board requested that the parties provide it with recommended procedures to be followed on remand, as provided in 43 CFR 4.29. The Board also noted that, on March 24, 1980, it had affirmed a decision by the Nevada State Office, Bureau of Land Management (BLM), declaring the Community No. 3 mining claim abandoned and void under

1/ J. L. Block was named in the contest complaint filed on March 1, 1967, as owner of the Community No. 3 Placer Claim. However, the copy of the proof of annual labor filed with BLM on October 18,, 1979, listed the sole owner of the claim as Nevada Pacific Co., Inc., J. L. Block, President. Thus, although the two appeals bear different names, they concern the same claim, in which Block held an interest, at least as late as 1979.

sec. 314 of the Federal Land Policy and Managernent Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976) because required documents were not filed along with a filing fee on or before October 22, 1979. Nevada Pacific Co., Inc., 46 IBLA 208 (1980) (docketed as Nevada Pacific Company, Inc., IBLA 80-297).

On December 22, 1980i BLM, through counsel, recomended that the contest of the validity of the Community No. 3 claim be dismissed as moot, since the Community No. 3 claim had been declared abandoned and void by a final Departmental decision, i.e. Nevada Pacific Co., Inc., supra. On January 5. 1981, Block responded that this decision was under ju icial review and that the validity of the claim was therefore still at issue. The Board took no action on these requests, but awaited the results of the judicial review of its decision on the FLPMA recordation question.

On June 30, 1983, the United States District Court for the District of Nevada issued a decision reversing the Board's decision in Nevada Pacific Co,, Inc., supra, and holding in favor of the claim holder. Nevada Pacific Company v. Andrus, Civ-LV-80-431, HEC (June 30, 1983). No appeal was taken.

On October 21, 1983, the United States District Court for the District of Nevada issued a decision declaring secs, 314(a) and (c) of the Federal Land Policy and Managemnt Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) and (c)(1982), unconstitutional insofar as they provide for a conclusive presumption of abandonment of mininq claims for a failure to provide timely annual filings with the Bureau of Land Management (BLM). Locke v. United States, 573 F. Supp. 472 (D. Nev. 1983). The United States appealed that decision to the United States Supreme Court. During the pendency of that case before the Supreme Court, the Board suspended consideration of mining claim recordation appeals.

On April 1, 1985, the Supreme Court issued its decision in United States v. Locke, 53 U.S.L.W. 4433 (U.S. Apr. 2, 1985), reversing the decision of the District Court and upholding the constitutionality of the recordation provisions of FLPMA. Accordingly, we have recommenced adjudication of mining claim recordation cases.

Where a decision of this Board affirming a determination that a mining claim was abandoned and void is reversed on appeal and the case is remanded to the Board, the decision of the Court constitutes the law of the case and the Board will vacate its prior decision and reinstate the claim. Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (1984). Thus, we hereby vacate our decision concerning the recordation of this claim (Nevada Pacific Co., Inc., supra) and rule that the claim has been reinstated.

On October 31, 1983, the Board issued an order requiring claimant to demonstrate that the filing requirements of sec. 314 of FLPMA had been met for the years 1980, 1981, and 1982. Nevada Pacific responded on November 25, 1983. It appears from this response that, in September 1983, it filed copies of the notice of location of the Community No. 3 claim and proofs of labor for assessment years ending on September I of 1979, 1980, 1981, 1982, and 1983, together with a map and a copy of the June 30, 1983,, decision of the District court in Nevada Pacific Co. v. Andrus, supra. Claimant stated that it could not have filed these documents prior to this date "for the reason that [BLM) on December 19, 1979, returned to [it] the $5.00 check, previously paid, the map, the notice of location and the proof of labor for 1979,"

BLM has not had an opportunity to consider either the nature and extent of Nevada Pacific's FLPMA filing obligations during the pendency of the litigation concerning its claim, or whether Nevada Pacific has met these obligations. There may be circumstances of which we are not aware that affect these determinations For example, we are unable to determine from the present record whether Nevada Pacific tendered a filing or filings to BLM during the pendency of litigation. If it did not, the consequences thereof should be determined by BLM in the first instance. The interests of efficient adjudication will best be served by remanding the matter to BLM for appropriate consideration of these and any other relevant questions.

There is also pending before the Board a remand from the Ninth Circuit concerning the "validity" of this claim,, i.e., concerning whether claimants have shown that there was a "discovery" on the claim as of July 23, 1955, the date that common varieties of sand and gravel were removed from the coverage of the Mineral Leasing Act of 1872. The Ninth Circuit noted as follows in its decision remanding the matter:

> Melluzzo [2] announced a "hypothetical market test," applicable when actual sales from the claim Are minimal or nonexistent. A hypothetical market is created by setting supply equal to that amount produced by all known sources as well as all known potentially competitive sources. Cost of production is calculated and subtracted from the hypothetical market price to determine whether the operation would have been profitable. In Melluzzo, we reversed and remanded a decision favorable to the Government because the critical questions raised by the Clear Gravel [3/], Barrows [4/], and Verrue [5/] cases did not have the attention of the hearing examiner.

More importantly, the parties may have been laboring under the false impression that the determination would turn entirely on the issue of whether any material had actually been marketed. Thus, virtually all the evidence goes to that issue. Fairness dictates that this case be remanded for further hearings and proceedings consistent with the views of this court in Melluzzo v. Morton, supra.

J. L. Block v. Andrus, supra. As appellant Block noted in his recommendations for procedures on remand, it is clear that the Ninth Circuit required that more hearings be held to determine the validity of the claim. Accordingly, our decision declaring the claim void for lack of discovery, United States v. Block, supra, is hereby vacated as well.

2/ Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976)
3/ Clear Gravel Enterprises, Inc. v. Keil, 505 F.2d 180 (9th Cir 1974)
4/ Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971)
5/ Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972)

Many years have passed since the initiation by BLM of the contest against the validity of the Community No. 3 placer mining claim. Administrative law Judge Ratzman, who took evidence on this contest in February 1971, has retired, so that it will be necessary to appoint a new administrative law judge to hear the matter. Further, we are not sure of BLM's present intentions as to pursuing its contest.

Accordingly, instead of referring this matter directly to the Hearings Division for further hearing, we are instead remanding it to BLM for consideration of initiating a new contest. If such contest is initiated, the previous evidence taken in 1971 by Judge Ratzman will be admissible and may be reviewed in light of the judicial standards identified by the Ninth Circuit in the language quoted above, as well as new standards more recently developed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1. these cases are remanded to BLM for further consideration.

Wm. Philip Horton
Chief Administrative Jude

We concur:

Franklin D. Arness
Administrative Jude

Edward W. Stuebing
Administrative Judge

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